

## **Chapter 3. Final Instructions: General**

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**Members of the jury, you have seen and heard all the evidence and the arguments of the lawyers. Now I will instruct you on the law.**

**You have two duties as a jury. Your first duty is to decide the facts from the evidence that you have heard and seen in court during this trial. That is your job and yours alone. I play no part in finding the facts. You should not take anything I may have said or done during the trial as indicating what I think of the evidence or what I think about what your verdict should be.**

**Your second duty is to apply the law that I give you to the facts. My role now is to explain to you the legal principles that must guide you in your decisions. You must apply my instructions carefully. Each of the instructions is important, and you must apply all of them. You must not substitute or follow your own notion or opinion about what the law is or ought to be. You must apply the law that I give to you, whether you agree with it or not.**

**Whatever your verdict, it will have to be unanimous. All of you will have to agree on it or there will be no verdict. In the jury room you will discuss the case among yourselves, but ultimately each of you will have to make up his or her own mind. This is a responsibility that each of you has and that you cannot avoid.**

**Perform these duties fairly and impartially. Do not allow sympathy,**

**prejudice, fear, or public opinion to influence you. You should also not be influenced by any person's race, color, religion, national ancestry, or gender** (*, sexual orientation, profession, occupation, celebrity, economic circumstances, or position in life or in the community*).

#### **Comment**

*See* O'Malley § 12.01. For variations on this instruction in other Circuits, *see* First Circuit § 3.01; Fifth Circuit §§ 1.03,1.04; Seventh Circuit § 1.01; Eighth Circuit §§ 3.01, 3.02; Ninth Circuit § 3.01.

One or more of the characteristics listed in the bracketed language in the last paragraph should be mentioned also, if it appears that there may be a risk that jurors could be influenced by those characteristics in a particular case. The trial judge may need to mention other characteristics that are not listed if it appears that they might influence jurors in a particular case.

**You must make your decision in this case based only on the evidence that you saw and heard in the courtroom. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decision in any way.**

**The evidence from which you are to find the facts consists of the following:**

- (1) The testimony of the witnesses;**
- (2) Documents and other things received as exhibits; and**
- (3) Any fact or testimony that was stipulated; that is, formally agreed to by the parties.**

*((4) Any facts that have been judicially noticed--that is, facts which I say you may accept as true even without other evidence.)*

**The following are not evidence:**

- (1) The indictment;**
- (2) Statements and arguments of the lawyers for the parties in this case;**
- (3) Questions by the lawyers and questions that I might have asked;**
- (4) Objections by lawyers, including objections in which the lawyers stated facts;**
- (5) Any testimony I struck or told you to disregard; and**
- (6) Anything you may have seen or heard about this case outside the courtroom.**

**You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience and common sense tells you that certain evidence reasonably leads to a conclusion, you may reach that conclusion.**

**As I told you in my preliminary instructions, the rules of evidence control what can be received into evidence. During the trial the lawyers objected when they thought that evidence was offered that was not permitted by the rules of evidence. These objections simply meant that the lawyers were asking me to decide whether the evidence should be allowed under the rules.**

**You should not be influenced by the fact that an objection was made. You should also not be influenced by my rulings on objections or any sidebar conferences you may have overheard. When I overruled an objection, the question was answered or the exhibit was received as evidence, and you should treat that testimony or exhibit like any other. When I allowed evidence (testimony or exhibits) for a limited purpose only, I instructed you to consider that evidence only for that limited purpose and you must do that.**

**When I sustained an objection, the question was not answered or the exhibit was not received as evidence. You must disregard the question or the exhibit entirely. Do not think about or guess what the witness might have said in answer to the question; do not think about or guess what the exhibit might have shown.**

**Sometimes a witness may have already answered before a lawyer objected or before I ruled on the objection. If that happened and if I sustained the objection, you must disregard the answer that was given.**

**Also, if I ordered that some testimony or other evidence be stricken or removed from the record, you must disregard that evidence. When you are deciding this case, you must not consider or be influenced in any way by the testimony or other evidence that I told you to disregard.**

**Although the lawyers may have called your attention to certain facts or factual conclusions that they thought were important, what the lawyers said is not evidence and is not binding on you. It is your own recollection and interpretation of the evidence that controls your decision in this case. Also, do not assume from anything I may have done or said during the trial that I have any opinion about any of the issues in this case or about what your verdict should be.**

#### **Comment**

*See O'Malley §§ 12.03, 12.07, 12.08. For variations on this instruction in other Circuits, see First Circuit §§ 3.04, 3.08; Fifth Circuit § 1.06; Sixth Circuit § 1.04; Eighth Circuit § 3.03; Ninth Circuit §§ 3.03, 3.04.*

The bracketed instruction (4) under what is evidence should be given only when the court has taken judicial notice of facts during the trial.

Two types of evidence may be used in this trial, “direct evidence” and “circumstantial (*or indirect*) evidence.” You may use both types of evidence in reaching your verdict.

“Direct evidence” is simply evidence which, if believed, directly proves a fact. An example of "direct evidence" occurs when a witness testifies about something the witness knows from his or her own senses — something the witness has seen, touched, heard, or smelled.

"Circumstantial evidence" is evidence which, if believed, indirectly proves a fact. It is evidence that proves one or more facts from which you could reasonably find or infer the existence of some other fact or facts. A reasonable inference is simply a deduction or conclusion that reason, experience, and common sense lead you to make from the evidence. A reasonable inference is not a suspicion or a guess. It is a reasoned, logical decision to find that a disputed fact exists on the basis of another fact.

For example, if someone walked into the courtroom wearing a wet raincoat and carrying a wet umbrella, that would be circumstantial or indirect evidence from which you could reasonably find or conclude that it was raining. You would not have to find that it was raining, but you could.

Sometimes different inferences may be drawn from the same set of facts. The

**government may ask you to draw one inference, and the defense may ask you to draw another. You, and you alone, must decide what reasonable inferences you will draw based on all the evidence and your reason, experience and common sense.**

**You should consider all the evidence that is presented in this trial, direct and circumstantial. The law makes no distinction between the weight that you should give to either direct or circumstantial evidence. It is for you to decide how much weight to give any evidence.**

#### **Comment**

*See O'Malley et al.*, 1A Fed. Jury Prac. & Instr. § 12.04 (5th ed. 2000); Sand, Federal Jury Instructions, 74-2. For variations of this instruction in other Circuits, *see* Fifth Circuit § 1.07; Sixth Circuit § 1.06; Seventh Circuit § 1.05; Eighth Circuit §§ 1.03 & 1.04; Ninth Circuit § 1.6.

This instruction provides a general explanation of what the terms direct and circumstantial evidence, infer and inference mean in the context of a trial. This instruction should be given in most cases since it is likely that the lawyers will use these terms.

In *Woodson v. Scott Paper Co.*, 109 F.3d 913 (3d Cir. 1997), the Third Circuit defined “direct evidence” as “evidence that proves an ultimate fact in a case without any process of inference, save inferences of credibility.” Direct evidence is evidence given by a witness as to a fact which the witness has observed or perceived. In contrast to direct evidence, circumstantial evidence is offered to prove an ultimate fact, but an inferential step by the fact finder is required to reach that fact. *See United States v. Casper*, 956 F.2d 416 (3d Cir. 1992). It is essential that there be a logical and convincing connection between the facts established and the conclusion inferred. *See, e.g., County Court v. Allen*, 442 U.S. 140 (1979). The fact that evidence is circumstantial does not mean that it has less probative value than direct evidence. *See Lukon v. Pennsylvania R. Co.*, 131 F.2d 327 (3d Cir. 1942). Also *see Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

In criminal cases, the Constitution mandates the use of permissive inferences rather than presumptions. *See Sandstrom v. Montana*, 442 U.S. 510, 515-17 (1979). The court should avoid the use of the term presume because it may unconstitutionally shift the burden of proof to the



defendant.

Instructions explaining specific permissible inferences are included in Chapter 6 with the other instructions concerning the offenses to which they apply. *See*, e.g., **cross reference**.

**As I stated in my preliminary instructions at the beginning of the trial, in deciding what the facts are you must decide what testimony you believe and what testimony you do not believe. You are the sole judges of the credibility of the witnesses. Credibility refers to whether a witness is worthy of belief: Was the witness truthful? Was the witness' testimony accurate? You may believe everything a witness says, or only part of it, or none of it.**

**You may decide whether to believe a witness based on his or her behavior and manner of testifying, the explanations the witness gave, and all the other evidence in the case, just as you would in any important matter where you are trying to decide if a person is truthful, straightforward, and accurate in his or her recollection. In deciding the question of credibility, remember to use your common sense, your good judgment, and your experience.**

**In deciding what to believe, you may consider a number of factors:**

- (1) The opportunity and ability of the witness to see or hear or know the things about which the witness testified;**
- (2) The quality of the witness' knowledge, understanding, and memory;**
- (3) The witness' appearance, behavior, and manner while testifying;**
- (4) Whether the witness has an interest in the outcome of the case or any motive, bias, or prejudice;**

**(5) Any relation the witness may have with a party in the case and any effect the verdict may have on the witness;**

**(6) Whether the witness said or wrote anything before trial that was different from the witness' testimony in court;**

**(7) Whether the witness' testimony was consistent or inconsistent with other evidence that you believe *[alternative: how believable the witness' testimony was when considered with other evidence that you believe]*; and**

**(8) Any other factors that bear on whether the witness should be believed.**

**Inconsistencies or discrepancies in a witness' testimony or between the testimony of different witnesses may or may not cause you to disbelieve a witness' testimony. Two or more persons witnessing an event may simply see or hear it differently. Mistaken recollection, like failure to recall, is a common human experience. In weighing the effect of an inconsistency, you should also consider whether it was about a matter of importance or an insignificant detail. You should also consider whether the inconsistency was innocent or intentional.**

**You are not required to accept testimony even if the testimony was not contradicted and the witness was not impeached. You may decide that the witness is not worthy of belief because of the witness' bearing and demeanor, or because of the inherent improbability of the testimony, or for other reasons that are sufficient to you.**

**After you make your own judgment about the believability of a witness, you can then attach to that witness' testimony the importance or weight that you think it deserves.**

**The weight of the evidence to prove a fact does not necessarily depend on the number of witnesses who testified or the quantity of evidence that was presented.**

**What is more important than numbers or quantity is how believable the witnesses were, and how much weight you think their testimony deserves.**

#### **Comment**

*See O'Malley § 15.01 (Credibility of Witnesses--Generally). For variations on this instruction in other Circuits, see First Circuit § 3.06; Eighth Circuit § 3.04; Ninth Circuit § 3.09.*

This instruction should be given in the final instructions at the end of the trial. In preliminary instructions at the beginning of trial, Instruction No. 1.10 should be given. The last paragraph of the instruction may be given usefully in a case in which more witnesses testify or more evidence is presented on one side than on the other. *See instruction No. \_\_ (Number of Witnesses)*. When the defendant testifies, Instruction No. 4.28 should also be given.

Some judges may want to explain the factors in this instruction by presenting them as questions that the jurors should ask themselves. *See Sixth Circuit § 1.07.*

**Although the government is required to prove the defendant guilty beyond a reasonable doubt, the government is not required to present all possible evidence related to the case or to produce all possible witnesses who might have some knowledge about the facts of the case. In addition, as I have explained, the defendant is not required to present any evidence or produce any witnesses.**

*[In this case, the (name of defendant) [presented evidence] [produced witnesses].*

*(Name) is not required to present all possible evidence related to the case or to produce all possible witnesses who might have some knowledge about the facts of the case.]*

#### **Comment**

As a general matter, there is no requirement that all witnesses or evidence be presented, and ordinarily no inference can be drawn from the failure to present all witnesses or evidence. However, in the rare case in which the government could have called an important witness, but failed to do so, Instruction 4.16 may be considered. Also, if the defendant has argued that the government's case is deficient because of the failure to use one or more specific investigative techniques, Instruction 4.14 should be considered.

The bracketed second paragraph should be used if the defendant produced witnesses or presented evidence.

### **3.06          Presumption of Innocence; Burden of Proof; Reasonable Doubt**

**The defendant *(name)* pleaded not guilty to the offense(s) charged. *(Name)* is presumed to be innocent. *(He)(She)* started the trial with a clean slate, with no evidence against *(him)(her)*. The presumption of innocence stays with *(name)* unless and until the government has presented evidence that overcomes that presumption by convincing you that *(name)* is guilty of the offense(s) charged beyond a reasonable doubt. The presumption of innocence requires that you find *(name)* not guilty, unless you are satisfied that the government has proved guilt beyond a reasonable doubt.**

**The presumption of innocence means that *(name)* has no burden or obligation to present any evidence at all or to prove that *(he)(she)* is not guilty. The burden or obligation of proof is on the government to prove that *(name)* is guilty and this burden stays with the government throughout the trial.**

**In order for you to find *(name)* guilty of the offense(s) charged, the government must convince you that *(name)* is guilty beyond a reasonable doubt. That means that the government must prove each and every element of the offense(s) charged beyond a reasonable doubt. A defendant may not be convicted based on suspicion or conjecture, but only on evidence proving guilt beyond a reasonable doubt.**

**Proof beyond a reasonable doubt does not mean proof beyond all possible**

**doubt or to a mathematical certainty. Possible doubts or doubts based on conjecture, speculation, or hunch are not reasonable doubts. A reasonable doubt is a fair doubt based on reason, logic, common sense, or experience. It is a doubt that an ordinary reasonable person has after carefully weighing all of the evidence, and is a doubt of the sort that would cause him or her to hesitate to act in matters of importance in his or her own life. It may arise from the evidence, or from the lack of evidence, or from the nature of the evidence.**

**If, having now heard all the evidence, you are convinced that the government proved each and every element of the offense charged beyond a reasonable doubt, you should return a verdict of guilty for that offense. However, if you have a reasonable doubt about one or more of the elements of the offense charged, then you must return a verdict of not guilty of that offense.**

#### **Comment**

*See* 1A O'Malley § 12.10. For variations in other Circuits, *see* First Circuit § 3.02; Eighth Circuit §§ 3.05-3.08, 3.11; Ninth Circuit §§ 3.2, 3.5.

It is imperative that the trial judge accurately define the government's burden of proof and the meaning of "beyond a reasonable doubt." As long as these concepts are accurately conveyed to the jury, there are no specific words that must be used. *See, e.g., United States v. Dufresne*, 58 Fed. Appx. 890 (3d Cir. 2003); *United States v. Hernandez*, 176 F.3d 719 (3d Cir. 1999). This instruction is modeled after the instructions the Third Circuit approved in these cases.

In *United States v. Issac*, 134 F.3d 199 (3d Cir. 1998), the Third Circuit considered a challenge to the district court's instructions on reasonable doubt. Specifically, the district court gave the so-called "two inference" instruction, as follows: "So if the jury views the evidence in the case as reasonably permitting either of two conclusions, one of innocence, the other of guilt, the jury should, of course, adopt the conclusion of innocence." 134 F.3d at 202. The Third

Circuit in *Issac* first noted that in *United States v. Jacobs*, 44 F.3d 1219, 1226 & n. 9 (3d Cir.), *cert. denied*, 514 U.S.1101 (1995), it “urged trial courts to heed the Second Circuit's criticism of the “two-inference” instruction when it is specifically brought to their attention.” (The Court’s reference to the Second Circuit was to *United States v. Inserra*, 34 F.3d 83, 91 (2d Cir.1994), which held that the “two-inference” instruction is improper because it “may mislead a jury into thinking that the government's burden is somehow less than proof beyond a reasonable doubt,”quoting *United States v. Khan*, 821 F.2d 90, 93 (2d Cir.1987)). The Third Circuit in *Issac* continued, “Although we disapproved of the “two-inference” instruction in *Jacobs*, we did not hold that the instruction was so constitutionally deficient *per se* that it infected the entire instruction on reasonable doubt. 44 F.3d at 1226.” Ultimately, the Third Circuit upheld the instruction in *Issac*, because “this deficiency was rectified by the remainder of the reasonable doubt instruction.” 134 F.3d at 202. Courts are, nevertheless, advised to instruct in accordance with the instruction above and to refrain from using the “two-inference” instruction.

If the defense presented an affirmative defense (one which does not seek to refute one of the elements of the offense(s) charged), as to which the law places the burden of persuasion on the defense, the second and third paragraph of this instruction should be modified to read as follows:

The prosecution always has the burden or obligation to prove each and every element of the offense(s) charged beyond a reasonable doubt. The defendant(s) (*name*) is (*are*) presumed to be innocent of the charge(s). The law does not impose on the (*name*) the burden of proving (*his*) (*her*) (*their*) innocence or of disproving any of the elements of the offense(s) charged.

The defendant(s) (*name*) in this case has (*have*), however, asserted the defense of (*state the affirmative defense that the defendant(s) asserted*). This is what the law calls an “affirmative defense.” This affirmative defense does not require (*name*) to disprove any element of the offense[s] charged, but it does require the defense to prove certain other facts that the law recognizes as a sufficient reason to find (*name*) not guilty.

You must consider the evidence presented by (*name*) in deciding if the government has proved the elements of the offense beyond a reasonable doubt. If you find that the government has proved each and every element of the offense(s) charged beyond a reasonable doubt, and only after you have made that finding, then you should decide whether (*name*) has proved the facts necessary to establish (*his*) (*her*) affirmative defense of (*state the affirmative defense raised*). To find that (*name*) has proved this affirmative defense, you must find that (*name*) has proved the elements of that defense by (*state the burden of proof by which the defendant must prove the specific affirmative defense raised in this case*).

*See, e.g., Patterson v. New York*, 432 U.S. 197, 206 (1977) (“In convicting Patterson under its murder statute, New York did no more than *Leland v. Oregon*, 343 U.S. 790 (1952) and *Rivera*



(*v. Delaware*, 429 U.S. 877 (1976) permitted it to do without violating the Due Process Clause. Under those cases, once the facts constituting a crime are established beyond a reasonable doubt, based on all the evidence including the evidence of the defendant's mental state, the State may refuse to sustain the affirmative defense of insanity unless demonstrated by a preponderance of the evidence.”).

**As you know, the defendant (*name*) is charged in the indictment with violating federal law, specifically (*state the offense(s) charged*). As I explained at the beginning of trial, an indictment is just the formal way of specifying the exact crime(*s*) the defendant is accused of committing. An indictment is simply a description of the charge(*s*) against a defendant. It is an accusation only. An indictment is not evidence of anything, and you should not give any weight to the fact that (*name*) has been indicted in making your decision in this case.**

#### **Comment**

*See* 1A O'Malley §13.04. For variations in other Circuits, *see* Seventh Circuit § 2.01; Eighth Circuit §§ 3.05-3.08; Ninth Circuit § 3.2.

In *United States v. Todaro*, 448 F.2d 64, 66 (3d Cir. 1971), cert. denied, 404 U.S. 1040 (1972), the Third Circuit held that “the District Judge did not err in allowing the jurors to have a copy of the indictment with them during their deliberations. This is a matter within the discretion of the District Judge, subject to a limiting instruction that the indictment does not constitute evidence, but is an accusation only.” Also *see, e.g., United States v. Stitt*, 380 F. Supp. 1172, 1175 (W.D.Pa.1974), *aff'd mem.*, 510 F.2d 971 (3d Cir.), cert. denied, 421 U.S. 962 (1975). Many judges do not send the indictment out with the jury unless the parties request it. If the trial judge does allow the jurors to have the indictment, he or she may need to redact it to eliminate any charges that have been dismissed or any irrelevant allegations.

**You will note that the indictment charges that the offense was committed "on or about" a certain date. The Government does not have to prove with certainty the exact date of the alleged offense. It is sufficient if the Government proves beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.**

### **Comment**

This instruction is derived from Eleventh Circuit § 9.1. For variations, *see* 1A O'Malley § 13.05; Sand, Form Instruction 3-12; Fifth Circuit § 1.18; Sixth Circuit § 2.04; and Seventh Circuit § 4.04.

In *United States v. Somers*, 496 F.2d 723 (3d Cir. 1974), the Third Circuit detailed the approach to variances between charges and proof as to the time of the offense.

[I]n evaluating variances, we must first determine whether there has been a modification in the elements of the crime charged. If such a modification exists, we will apply the per se rule of *Stirone* [reversal without inquiry into prejudice to the defendant] so as to preserve the shielding function of the grand jury. If, on the other hand, the variance does not alter the elements of the offense charged, we will focus upon whether or not there has been prejudice to the defendant . . . .

496 F.2d at 744 (citations omitted).

The court noted also that when "the grand jury speaks in more general terms, . . . [b]y the use of the qualifying phrase 'on or about', the grand jury indicates its unwillingness to pinpoint the date of the offense charged." 496 F.2d at 745. *See also United States v. Schurr*, 775 F.2d 549, 558 (3d Cir. 1985) (noting that "in a case involving an alibi defense, a variance in proof of a date is not material in the absence of some specific evidence of prejudice"); *United States v. Frankberry*, 696 F.2d 239, 245 (3d Cir. 1982) (concluding that exact date of firearm possession was critical in light of prosecution theory that defendant possessed two firearms simultaneously).

**The indictment alleges that some act in furtherance of the offense charged occurred here in *(name of venue)*. There is no requirement that *(all aspects of the offense charged)(the entire conspiracy)* take place here in *(name of venue)*. But for you to return a guilty verdict, the government must convince you that *(some act in furtherance of the crime charged)(either the agreement, or one of the overt acts)*, took place here in *(name of venue)*.**

**Unlike all the elements that I have described, this fact only has to be proved by a preponderance of the evidence. This means the government only has to convince you that it is more likely than not that *(some act in furtherance of the crime charged)(part of the conspiracy)* took place here.**

**Remember that the government must prove all the elements I have described beyond a reasonable doubt.**

### **Comment**

This instruction is derived from Sixth Circuit §3.07. For variations, see Sand § 3-11 and Eighth Circuit § 3.13.

Venue is a question of fact for the jury. While generally described as an element of the offense, venue need only be established by a preponderance of the evidence. *United States v. Perez*, 280 F.3d 318, 329-30 (3d Cir. 2003).

If venue is in issue in the case, it may be error to refuse to instruct the jury concerning the requirement that the government prove venue. However, the instruction is not otherwise required, and is normally not given. In *Perez*, 280 F.3d 318, 327 (3d Cir. 2003), the Third Circuit held that:

[W]here the indictment alleges venue without a facially obvious defect, the failure to instruct the jury to determine whether that venue is proper is reversible error only when (1) the defendant objects to venue prior to or at the close of the prosecution's case-in-chief, (2) there is a genuine issue of material fact with regard to proper venue, and (3) the defendant timely requests a jury instruction. Because the first and second prerequisites were unmet here, the District Court did not err in failing to instruct the jury on venue.

*See also United States v. Schofield*, 80 Fed. Appx. 798, 805 (3d Cir. 2003) (holding that venue was not in issue under *Perez*).

### 3.10

### Elements of the Offense(s) Charged

**The defendant** *(name)* **is charged in the indictment with committing the offense of** *(state the offense charged)*. **This offense has** \_\_\_\_ **essential elements, which are:**

**First,** *(state the first element)*;

**Second,** *(state the second element)*;

**Third,** *(state the third element)*; **and**

*(State each additional element).*

*(Name)* **is also charged with committing the offense of** *(state any additional offense charged)*. **The elements of that offense are:**

*(State the elements of any additional offense, as above.)*

**In order to find** *(name)* **guilty of** *(this)(these)* **offense(s), you must all find that the government proved each of these elements beyond a reasonable doubt, as I will explain in more detail shortly.**

#### Comment

*See* 1A O'Malley § 13.03. For variations in other Circuits, *see* Seventh Circuit § 4.01; Eighth Circuit § 3.09.

Chapter 6 of these Model Instructions includes specific instructions on the elements of the most commonly charged federal offenses. If the defendant is charged with an offense included within that Chapter, the instruction there should be given. The instruction above should be used for offenses not specifically covered in Chapter 6.

The relevant statutory provision defining the offense and any controlling case law should

be examined to determine the essential elements of the offense. The trial judge should describe the elements in this instruction. This description should state the elements using language that is as plain and simple as possible. In addition, it may be necessary to explain to the jury what these elements mean. Chapters 5 (Criminal Responsibility), 7 (Mental States), 8 (Definitions), and 9 (Defenses and Theories of Defense) should also be consulted and used where appropriate.

If the indictment contains multiple counts or if there are multiple defendants who are being tried together, *see* Instructions 1.16.

**I have just explained what the government has to prove for you to find *(name)* guilty of the offense(s) charged in *(Count \_\_\_ of)* the indictment, (e.g., committing a bank robbery in which someone was exposed to risk of death by the use of a dangerous weapon). The law also permits the jury to decide whether the government has proven *(name)* guilty of another, lesser offense which is, by its very nature, necessarily included in the offense of *(state offense)* that is charged in *(Count \_\_\_ of)* the indictment.**

**The offense of *(state offense)*, that is charged in *(Count \_\_\_ of)* the indictment, necessarily includes the lesser offense(s) of *(state lesser included offense(s))*. In order to find *(name)* guilty of this *(these)* lesser included offense(s), the government must prove the following elements beyond a reasonable doubt:**

**First, *(state the first element)*;**

**Second, *(state the second element)*;**

**Third, *(state the third element)*; and**

***(State each additional element)*.**

**The difference between the offense charged in *(Count \_\_\_ of)* the indictment and the lesser offense(s) that *(is)(are)* included within it is that for the offense charged in *(Count \_\_\_ of)* the indictment, the government must prove \_\_\_\_\_, but it does not have to do so to prove the lesser included offense(s).**



**If you find unanimously that the government has proved beyond a reasonable doubt each of the elements of the offense of *(state offense)* charged in *(Count \_\_\_\_ of)* the indictment, then you should find *(name)* guilty of that offense and your foreperson should write "guilty" in the space provided on the verdict form for that offense *(for that defendant)*. Your consideration of that offense *(for that defendant)* is then concluded.**

**However, if you find unanimously that the government has not proved beyond a reasonable doubt each element of the offense of *(state offense)* charged in *(Count \_\_\_\_ of)* the indictment, then you must find *(name)* not guilty of that offense and your foreperson should write "not guilty" in the space provided for that offense *(for that defendant)* on the verdict form. You should then consider whether the government has proved beyond a reasonable doubt all the elements of the lesser offense(s) of *(name of offense(s))* that *(is)(are)* included in the offense of *(state offense)* charged in *(Count \_\_\_\_ of)* the indictment.**

**If you find unanimously that the government has proved beyond a reasonable doubt each of the elements of *(this)(these)* lesser included offense(s), then you should find *(name)* guilty of *(this)(these)* lesser included offense(s) and your foreperson should write "guilty" in the space provided for *(this)(these)* lesser included offense(s) *(for that defendant)* on the verdict form. However, if you find unanimously that the government has not proved beyond a reasonable doubt each element of *(this)(these)***

**lesser included offense(s), then you must find (name) not guilty of (this)(these) offense(s) and your foreperson should write "not guilty" in the space provided for (this)(these) lesser included offense(s) (for that defendant) on the verdict form.**

**You should remember that the burden is always on the government to prove, beyond a reasonable doubt, each and every element of the offense charged in the indictment or of any lesser included offense.**

### **Comment**

*See* O'Malley § 20.05. For variations in other Circuits, *see* Sixth Circuit § 8.07; Seventh Circuit § 7.02; Eighth Circuit § 11.02.

Rule 31(c) of the Federal Rules of Criminal Procedure provides: "The defendant may be found guilty of any of the following: (1) an offense necessarily included in the offense charged; (2) an attempt to commit the offense charged; or (3) an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right." The rule restates prior law, *see Berra v. United States*, 351 U.S. 131 (1956), and permits the jury to find the defendant guilty of a lesser included offense even though it was not explicitly charged in the indictment.

In *Schmuck v. United States*, 489 U.S. 705 (1989), the Supreme Court concluded that, "one offense is not 'necessarily included' in another [under Rule 31(c)] unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c)." 489 U.S. at 716. Thus, under the elements only test, an offense is a lesser included offense only if all of its statutory elements can be demonstrated without proof of any fact or element in addition to those which must be proved for the greater offense. An offense is not a lesser included offense if it contains an additional statutory element that is not included in the greater offense.

A lesser included offense instruction is not automatic merely because legally there is a lesser included offense. First, ordinarily a lesser included offense instruction must be requested by one of the parties. Second, an instruction for a lesser included offense is proper only if the evidence would permit a rational jury to find guilt for the lesser offense and acquit on the greater offense that is charged in the indictment; *i.e.*, only if under a reasonable view, the evidence is

sufficient to establish guilt of the included offense and also leave a reasonable doubt as to some particular element of the charged offense. Thus, an instruction for a lesser included offense is proper only when conviction of the charged offense requires that the jury find a disputed fact which is not an element of the included offense. “[A] lesser-offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses.... In other words, the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater.” *Sansone v. United States*, 380 U.S. 343, 349-50 (1965).

When the jury is instructed on lesser included offenses of the offense charged in the indictment, the verdict form should accurately reflect the choices presented to the jury. *See* Instruction 3.17 (Verdict Form). This is important to avoid the type of ambiguous verdict that prompted the Third Circuit to reverse in *United States v. Barrett*, 870 F.2d 953 (3d Cir. 1989). In *Barrett*, the trial judge instructed the jury that it might find the defendant guilty as charged, guilty of a lesser included offense, or not guilty, but the verdict slip only provided places to mark guilty or not guilty. Thus, the jury’s mark of guilty on the verdict slip could have meant it convicted defendant either of the charged offense or the lesser included offense, and thus amounted to a fatal ambiguity in the verdict constituting reversible error. The Third Circuit stated that the problem should be avoided by providing verdict forms to the jury that leave no doubt as to what the jury has determined. 870 F.2d at 954-55, citing 1 F. Devitt and C. Blackmar, *Federal Jury Practice and Instructions* § 18.05, at 584 (3d ed. 1977). The Third Circuit also rejected the government’s argument that the trial judge could use special interrogatories to clarify the ambiguous verdict (*see* Instruction 3.18 Comment), but noted that the trial judge could have sent the jury back for further deliberations to clarify the ambiguity before accepting the verdict. 870 F.2d at 955, 955 n.1. Also *see* James A. Strazzella & James A. Shellenberger, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 Marq. L. Rev. 1, 180-83 (“Submitting Verdict Options to the Jury and Receiving the Verdicts”).

O’Malley suggests alternative language in the lesser included offense instruction, “[If, after reasonable efforts have been unsuccessful, the jury is unable to reach a verdict as to whether or not the government has proven each element of the offense charged in [Count \_\_\_\_ of] the indictment, the jury should then consider whether or not Defendant \_\_\_\_\_ is guilty or not guilty of the [less serious] [other] crime of \_\_\_\_\_ which is necessarily included in the offense of \_\_\_\_\_ charged in [Count \_\_\_\_ of] the indictment.]” O’Malley, § 20.05. Other Circuits include similar alternative language. *See, e.g.*, Sixth Circuit § 8.07; Seventh Circuit § 7.02; Eighth Circuit § 11.02. This alternative is not included in the above instruction because it might encourage jurors not to agree on a verdict. Also, although retrial is permitted after a mistrial has been properly declared because of a hung jury, Fed. R. Crim P. 31(b)(3); *Richardson v. United States*, 468 U.S. 317 (1984), it is not clear whether a conviction on a lesser included offense might preclude retrial on the charged offense on which the jury could not agree.

### **3.12 Separate Consideration--Single Defendant Charged with Multiple Offenses**

**The defendant *(name)* is charged with *(more than one offense)**(several offenses)*; each offense is charged in a separate count of the indictment.**

**The number of offenses charged is not evidence of guilt, and this should not influence your decision in any way. You must separately consider the evidence that relates to each offense, and you must return a separate verdict for each offense. For each offense charged, you must decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of that particular offense.**

**Your decision on one offense, whether guilty or not guilty, should not influence your decision on any of the other offenses charged. Each offense should be considered separately.**

#### **Comment**

*See* 1A O'Malley §§ 12.11-12.14. For variations in other Circuits, *see* Eighth Circuit §§ 3.05-3.08; Ninth Circuit §§ 3.12-3.14; Eleventh Circuit §§ 10.1-10.04.

### **3.13 Separate Consideration--Multiple Defendants Charged with a Single Offense**

**The defendants (*names*) are all charged with one offense. In our system of justice, however, guilt or innocence is personal and individual. You must separately consider the evidence against each defendant, and you must return a separate verdict for each defendant. For each defendant, you must decide whether the government has proved that particular defendant guilty beyond a reasonable doubt.**

**Your decision on one defendant, whether guilty or not guilty, should not influence your decision on any of the other defendants. Each defendant should be considered individually.**

#### **Comment**

*See* 1A O'Malley §§ 12.11-12.14. For variations in other Circuits, *see* Eighth Circuit §§ 3.05-3.08; Ninth Circuit §§ 3.12-3.14; Eleventh Circuit §§ 10.1-10.04.

### **3.14 Separate Consideration--Multiple Defendants Charged with the Same Offenses**

**The defendants (*names*) are all charged with (*more than one offense*)(*several offenses*); each offense is charged in a separate count of the indictment. The number of offenses charged is not evidence of guilt, and this should not influence your decision in any way. Also, in our system of justice, guilt or innocence is personal and individual. You must separately consider the evidence against each defendant on each offense charged, and you must return a separate verdict for each defendant on each offense. For each defendant and offense, you must decide whether the government has proved beyond a reasonable doubt that the particular defendant is guilty of the particular offense.**

**Your decision on any one defendant or any one offense, whether guilty or not guilty, should not influence your decision on any of the other defendants or offenses. Each offense and each defendant should be considered separately.**

#### **Comment**

*See* 1A O'Malley §§ 12.11-12.14. For variations in other Circuits, *see* Eighth Circuit §§ 3.05-3.08; Ninth Circuit §§ 3.12-3.14; Eleventh Circuit §§ 10.1-10.04.

### **3.15 Separate Consideration--Multiple Defendants Charged with Different Offenses**

**The defendants (*names*) are charged with different offenses. I will explain to you in more detail shortly which defendants are charged with which offenses.**

**Before I do that, however, I want to emphasize several things.**

**The number of offenses charged is not evidence of guilt, and this should not influence your decision in any way. Also, in our system of justice, guilt or innocence is personal and individual. You must separately consider the evidence against each defendant on each offense charged, and you must return a separate verdict for each defendant for each offense. For each defendant and each offense, you must decide whether the government has proved beyond a reasonable doubt that a particular defendant is guilty of a particular offense.**

**Your decision on any one defendant or any one offense, whether guilty or not guilty, should not influence your decision on any of the other defendants or offenses. Each offense and each defendant should be considered separately.**

#### **Comment**

*See* 1A O'Malley §§ 12.11-12.14. For variations in other Circuits, *see* Eighth Circuit §§ 3.05-3.08; Ninth Circuit §§ 3.12-3.14; Eleventh Circuit §§ 10.1-10.04.

### **3.16 Election of Foreperson; Unanimous Verdict; Do Not Consider Punishment; Duty to Deliberate; Communication with Court**

**That concludes my instructions explaining the law regarding the testimony and other evidence, and the offenses charged. Now let me explain some things about your deliberations in the jury room, and your possible verdicts.**

***First*, the first thing that you should do in the jury room is choose someone to be your foreperson. This person will speak for the jury here in court. He or she will also preside over your discussions. However, the views and vote of the foreperson are entitled to no greater weight than those of any other juror.**

***Second*, I want to remind you that your verdict, whether it is guilty or not guilty, must be unanimous. To find *(name of defendant)* guilty of an offense, every one of you must agree that the government has overcome the presumption of innocence with evidence that proves each element of that offense beyond a reasonable doubt. To find *(name)* not guilty, every one of you must agree that the government has failed to convince you beyond a reasonable doubt.**

***Third*, if you decide that the government has proved *(name)* guilty, then it will be my responsibility to decide what the appropriate punishment should be. You should never consider the possible punishment in reaching your verdict.**

***Fourth*, as I have said before, your verdict must be based only on the evidence received in this case and the law I have given to you. You should not take**



anything I may have said or done during trial as indicating what I think of the evidence or what I think your verdict should be. What the verdict should be is the exclusive responsibility of the jury.

*Fifth*, now that all the evidence is in, the arguments are completed, and once I have finished these instructions, you are free to talk about the case in the jury room. In fact, it is your duty to talk with each other about the evidence, and to make every reasonable effort you can to reach unanimous agreement. Talk with each other, listen carefully and respectfully to each other's views, and keep an open mind as you listen to what your fellow jurors have to say. Do not hesitate to change your mind if you are convinced that other jurors are right and that your original position was wrong. But do not ever change your mind just because other jurors see things differently, or just to get the case over with. In the end, your vote must be exactly that--your own vote. It is important for you to reach unanimous agreement, but only if you can do so honestly and in good conscience. Listen carefully to what the other jurors have to say, and then decide for yourself if the government has proved the defendant guilty beyond a reasonable doubt.

No one will be allowed to hear your discussions in the jury room, and no record will be made of what you say. You should all feel free to speak your minds.

*[Remember, if you elected to take notes during the trial, your notes should be used only as memory aids. You should not give your notes greater weight than your*

*independent recollection of the evidence. You should rely upon your own independent recollection of the evidence or lack of evidence and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any more weight than the memory or impression of each juror.]*

**Sixth, once you start deliberating, do not talk about the case to the court officials, or to me, or to anyone else except each other. If you have any questions or messages, your foreperson should write them down on a piece of paper, sign them, and then give them to the court official who will give them to me. I will first talk to the lawyers about what you have asked, and I will respond as soon as I can. In the meantime, if possible, continue with your deliberations on some other subject.**

*[If you want to see any of the exhibits that were admitted in evidence, you may send me a message and, if I can legally do so, I will have those exhibits provided to you.]*

**One more thing about messages. Do not ever write down or tell anyone how you or any one else voted. That should stay secret until you have finished your deliberations. If you have occasion to communicate with the court while you are deliberating, do not disclose the number of jurors who have voted to convict or acquit on any offense(s).**

#### **Comment**

*See O'Malley § 20.01. For variations in other circuits, see First Circuit §§ 6.01-6.03, 6.05; Fifth Circuit §§ 1.24, 1.20; Sixth Circuit §§ 8.01, 8.03-8.05, 8.09-8.10; Seventh Circuit §§ 7.01-7.02, 7.05-7.06; Eighth Circuit § 3.12; Ninth Circuit §§ 7.1-7.4, 7.6; Eleventh Circuit §§ 11-*

12.

This instruction should be modified if necessary to be consistent with the practice within the district. For example, with respect to the “*First*” paragraph, the trial judge selects the jury foreperson in the District of Delaware.

The bracketed paragraph with respect to the use of juror’s notes should be used if the jurors were permitted to take notes during trial. *See* Instruction No. 1.05.

“Court official” in paragraph “*Sixth*” includes the court personnel who are responsible for caring for the jury during their deliberations.

Whether to send exhibits out with the jury is within the trial court’s discretion and practice varies widely. *See* O’Malley § 20.04. Some judges send out the exhibits routinely in all cases, others do so only with the agreement of the lawyers, others leave it to the jury to ask for the exhibits. As for allowing the jurors to have the indictment during deliberations, see **Comment to Instruction** \_\_\_\_.

**A verdict form has been prepared that you should use to record your verdict(s).**

**Take this form with you to the jury room. When you have reached your unanimous verdict(s), the foreperson should write the verdict(s) on the form, date and sign it, return it to the courtroom and give the form to my courtroom deputy to give to me. If you decide that the government has proved (name) guilty of any or all of the offenses charged beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. If you decide that the government has not proved (name) guilty of some or all of the offenses charged beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form.**

#### **Comment**

*See O'Malley § 20.01. For variations in other circuits, see First Circuit § 6.04; Sixth Circuit § 8.06; Seventh Circuit § 7.01-7.02; Eighth Circuit §§ 3.12, 11.01-11.03; Ninth Circuit § 7.5; Eleventh Circuit § 12.*

The trial judge should review the verdict form with counsel before submitting it to the jury. This instruction and the verdict form will need to be modified to reflect different practices among the districts and trial judges. For example, in the Western District of Pennsylvania each juror signs the verdict form, not only the foreperson. If that practice is followed, it should be explained to the jury. (*E.g.*, “When you have reached your unanimous verdict(s), the foreperson should write the verdict(s) on the form and date it. Each juror should then sign the verdict form in the spaces provided at the end. When you return to the courtroom, the foreperson will give the form to my courtroom deputy to give to me.”) Also, different judges may have different practices with respect to presenting the verdict form to the jury. Some judges may read the form to the jury, others may hand it out and then orally review it with the jurors, others may refer to the verdict form throughout their instructions on the offense(s).

When the jury has been instructed on lesser included offenses of the offense charged in the indictment, the verdict form should accurately reflect the choices presented to the jury. *See* Instruction 3.11.

### 3.18

### Special Verdict Form; Special Interrogatories

No instruction recommended

#### COMMENT

The Third Circuit has stated that special interrogatories are disfavored in criminal cases, but they may be used in the discretion of the trial court. If special interrogatories are used, the trial court should make it clear that the jury should answer the special interrogatories only after it has already found the defendant guilty. Thus, in *United States v. Hedgepeth*, 434 F.3d 609, 613 (3d Cir 2006), the Third Circuit stated that:

“Although special interrogatories are disfavored in criminal trials, this court has established no per se rule against them.” *United States v. Palmeri*, 630 F.2d 192, 202 (3d Cir.1980), *cert. denied*, 450 U.S. 967 (1981) (citations omitted). “Nevertheless, there are circumstances where the use of special findings may be necessary,” including “where a determination of certain facts will be crucial to the sentence....” *United States v. Desmond*, 670 F.2d 414, 418 (3d Cir.1982); *see also United States v. Barrett*, 870 F.2d 953, 955 (3d Cir.1989) (“sharply contrast[ing]” use of special interrogatories “to assist in sentencing” with their impermissible use “to clarify an ambiguous verdict”).

The “disfavor with which courts view special interrogatories in criminal cases results from interrogatories that lead the jury in a step-by-step progression to a verdict of guilty.” *Palmeri*, 630 F.2d at 202. Therefore, our Court has held that, when special findings are necessary for sentencing purposes, “the appropriate information may be obtained by submitting special interrogatories to the jury after a guilty verdict has been returned.” *Desmond*, 670 F.2d at 418.

The Third Circuit also noted in *Hedgepeth* that, “[a] special interrogatory has been submitted ‘after’ a guilty verdict has been returned when jurors are instructed on a single form to answer the special interrogatory only after filling out a verdict of guilty or not guilty.” *United States v. Hedgepeth*, 434 at 613 fn 2. In *Hedgepeth*, the verdict slip was structured so that it instructed the jury to determine first whether the defendant was guilty of possession of a firearm by a felon and, only after making that determination, to consider the special interrogatories. The Third Circuit reasoned that the “danger of prejudice to *Hedgepeth* was thus alleviated, as we cannot say that the jury was led step-by-step to a guilty verdict when the special findings followed the guilt determination,” *id.* citing *United States v. Console*, 13 F.3d 641, 663 (3d Cir. 1993). The court concluded, “As we have held that special interrogatories are appropriate in the sentencing context when they are considered by the jury after a guilty verdict has been rendered, it was not an abuse of discretion for the District Court to allow the Government to submit the special verdict form to the jury.” 434 F.3d at 614.

The Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny emphasize the need for specific jury findings for sentencing purposes and the potential use of special interrogatories after a guilty verdict. *Apprendi* held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Also see *Blakely v. Washington*, 542 U.S. 296, 303 (2004) ("the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"); *Washington v. Recuenco*, \_\_\_ U.S. \_\_\_, S. Ct. (2006) (government conceded error by trial judge's imposing "firearm" enhancement to defendant's sentence, but Supreme Court remanded for determination whether the error was harmless, where the jury answered a special verdict form that defendant convicted of assault in the second degree was armed with a "deadly weapon" at the time of the offense, but nothing in the verdict form required jury specifically to find that defendant had used a "firearm").

In *United States v. Console*, 13 F.3d 641, 663 (3d Cir. 1993), the issue was whether the trial judge should have submitted to the jury special interrogatories with respect to the elements of a RICO charge. The Third Circuit stated, "A defendant has no right to a verdict on the elements of an offense. *United States v. Riccobene*, 709 F.2d at 228. The district court has discretion in determining whether to submit special interrogatories to the jury regarding the elements of an offense. *Riccobene*, 709 F.2d at 228. '[E]ven where the opposing party does not object, the court is not required to submit special questions to the jury.' *Id.*" In *Console*, the court found no evidence that the district court abused its discretion in denying defendant's request for special interrogatories, "as the jury already was faced with the difficult task of resolving multiple RICO and mail fraud counts against multiple defendants. Moreover, even when special interrogatories regarding RICO predicates are submitted to the jury, the court is permitted to give an instruction to the jury to answer the interrogatories *only after it votes to convict*, thereby alleviating the danger of prejudice to the defendant." 13 F.3d at 663 (emphasis added).

The only Circuit to include a special verdict instruction or form in its model instructions is the Eighth Circuit, Model Jury Instruction § 11.03 (Sample Special Verdict Form (Interrogatories To Follow Finding Of Guilt)), which states:

#### VERDICT

We, the jury, find defendant (name) \_\_\_\_\_ guilty/not guilty of the use of a firearm during and in relation to a crime of violence [as charged in Count \_\_\_\_\_ of the indictment] [under Instruction No. \_\_\_\_\_].

If you find defendant "guilty," you must answer the following:

Which of the following firearms do you find were used by defendant?

- \_\_\_\_\_ A 9mm semi-automatic pistol.
- \_\_\_\_\_ An M-16 fully automatic rifle.
- \_\_\_\_\_ A short-barreled 12-gauge shotgun.

(Check each firearm which the jury unanimously agrees defendant used.)

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Foreperson

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(Date)

Under *Apprendi*, et al, the jury should also be instructed it must unanimously find that the “sentencing factors” were proved beyond a reasonable doubt.

In addition to RICO and firearms cases, special interrogatories may also be useful in narcotics cases in which the potential sentence may depend on the quantity and type of drug proved by the evidence. *See* Instructions **cross-reference**.